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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

THOMAS JAMES CHANCE,
Petitioner,

v.

THE STATE OF SOUTH CAROLINA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

May a constitutionally valid uncounseled misdemeanor that was adjudicated in magistrate's court be considered a prior offense for the purpose of sentencing the recidivist offender?

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The Respondent State of South Carolina respectfully requests that the Court deny the petition for a writ of certiorari, seeking review of the Supreme Court of South Carolina's opinion in this case. That opinion is The State v. Thomas James Chance, ____S.C.____, 405 S.E.2d 375 (1991) and is reproduced in Petitioner's Appendix.

STATUTE INVOLVED

Driving under the influence, proscribed by S.C. Code Ann. § 56-5-2930 (1991), is punished pursuant to S.C. Code Ann. § 56-5-2940 (1991). The specific punishment provisions for first and second offenses, are, in part, as follows:

> A person violating a provision of Section 56-5-2930, upon conviction, entry of a plea of guilty or of nolo contendere or forfeiture of bail, must be punished in accordance with the following:
>
> > (1) By a fine of two hundred dollars or imprisonment for not less than forty-eight hours nor more than thirty days, for the first offense. However, in lieu of the forty-eight hour minimum imprisonment the court may provide for forty-eight hours of public service employment. The minimum forty-eight hour imprisonment or public service employment must be served at a time when the person is off from work and does not interfere with his

> regular employment under terms and conditions as the court considers proper. However, the court may not compel an offender to perform public service employment in lieu of the minimum sentence.
>
> (2) By a fine of not less than two thousand dollars nor more than five thousand dollars and imprisonment for not less than forty-eight hours nor more than one year for the second offense. However, the fine imposed by this item may not be suspended in an amount less than one thousand dollars. In lieu of service of imprisonment the court may require that the individual complete an appropriate term of public service employment of not less than ten days upon terms and conditions the court considers proper.

S.C. Code Ann. § 56-5-2940 (1) and (2) (1991).

STATEMENT OF THE CASE

While legally under the influence of alcohol, Petitioner apparently lost control of his vehicle, travelled down an embankment, and struck a utility pole. (Tr. p. 17). The incident resulted in the present, second offense of driving under the influence.

Petitioner's prior, first offense of driving under the influence was adjudicated in magistrate's court in 1980 through a guilty plea. Petitioner's counsel acknowledges that Petitioner did not have the right to appointed counsel for his first offense of driving under the influence. Petitioner also acknowledges that he did not request a lawyer when he entered the guilty plea. Similarly, Petitioner makes no claim he was deprived of counsel or did not know that he could have elected to retain counsel. Petitioner only contends that because he did not have an attorney present

when he pled guilty to first offense driving under the influence, his prior offense in 1980 cannot enhance the present offense to driving under the influence, second offense. (Tr. pp. 1-3, 11, 13-14).

Petitioner's contention is without support in the law of both the State of South Carolina and federal constitutional authority. Contrary to Petitioner's argument based upon Baldasar v. Illinois, 446 U.S. 222, 100 S.Ct. 1585, 64 L.Ed.2d 169 (1980), the trial judge properly considered Petitioner's 1980 conviction as a prior offense and sentenced him as a second time driving under the offense offender pursuant to S.C. Code Ann. § 56-5-2940 (1991). The judgment of the trial court was correctly affirmed by the Supreme Court of South Carolina consistent with both public policy and the Court's prior decisions.

SUMMARY OF ARGUMENT

Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979) held that an uncounseled misdemeanor conviction is constitutionally valid if the offender is not actually incarcerated. The South Carolina Supreme Court adopted a bright line rule and concluded that an uncounseled conviction constitutionally valid under Scott is valid for all purposes and may be used to increase the term of imprisonment for a subsequent offense under an enhanced penalty statute. The State court's holding recognizes the distinct validity of a prior uncounseled misdemeanor for which the defendant was not actually incarcerated and correctly and consistently applies this principle.

REASON WHY THE PETITION SHOULD BE DENIED

The Supreme Court of South Carolina recognizes and applies the Court's decision in Scott v. Illinois, constitutionally and consistently, to recividist offenses.

Actual imprisonment is the line defining the constitutional right to appointment of counsel. Scott v. Illinois, supra. "[T]he Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." Id.

The basis of Petitioner's present complaint is the per curiam opinion Baldasar, supra, which consists of three concurring opinions and one dissenting opinion. In Baldasar the Court reviewed Illinois law which provided that theft "not from the person" of property worth less than One Hundred Fifty ($150) Dollars was a misdemeanor punishable by not more than a

year of imprisonment and a fine of not over One Thousand ($1,000) Dollars. A second, subsequent conviction for the same offense carried an enhanced felony punishment of a prison term of one (1) to three (3) years. Baldasar was not represented by counsel and did not formally waive any right to counsel. He was not imprisoned as a result of his first conviction. At the time of his second conviction, Baldasar was represented by counsel and sentenced to prison for one (1) to three (3) years under the statutory sentencing enhancement provision. Baldasar, 447 U.S. at 222-223.

A majority of the United States Supreme Court held that the uncounseled first offense -- while valid under Scott v. Illinois because it had not resulted in actual imprisonment -- was not valid for all purposes and could not be used under the enhanced penalty statute to impose an increased term of imprisonment for a

subsequent conviction. Only the disposition -- not any supporting rationale for the disposition -- was agreed upon by a majority of the Court.

In Baldasar four (4) Justices held that an uncounseled conviction -- which itself was invalid for imposing imprisonment -- could never be used to increase a term of imprisonment for a subsequent conviction under a statutory enhancement provision. (Stewart, J., concurring, joined by Brennan and Stevens, JJ.; Marshall, J., concurring, joined by Brennan and Stevens, JJ.). A fifth Justice, Mr. Justice Blackmun, concurred in the result solely on the basis that Baldasar's first offense had been for a crime punishable for more than six (6) months imprisonment. Mr. Justice Blackmun restated a portion of his dissent in Scott v. Illinois expressing his belief that an indigent defendant in a state criminal case should be afforded counsel if an offense

actually subjects him to imprisonment or if he is prosecuted for a non-petty criminal offense, one punishable by more than six (6) months imprisonment. (Blackmun, J., concurring). Four (4) Justices noted 1) under Scott v. Illinois "actual imprisonment [is] the line defining the constitutional right to appointment of counsel[,]" 2) repeat offender laws penalize the last offense, 3) the majority's creation of a hybrid offense -- constitutionally valid in one instance and not in another -- could only create burdensome confusion, and held that an uncounseled conviction, for which no actual imprisonment is imposed, is constitutionally valid and available for sentence enhancement. (Powell, J., dissenting, joined by Burger, C.J., and White and Rehnquist, JJ.).

Courts attempting to apply Baldasar have reached different conclusions concerning its meaning. Moore v. Georgia,

484 U.S. 904, 108 S.Ct. 247, 98 L.Ed.2d 204 (1987) (petition for writ of certiorari denied; White, J., dissenting). It has also been held that "[t]he Court in Baldasar divided in such a way that no rule can be said to have resulted." United States v. Robles-Sandoval, 637 F.2d 692 n.1 (9th Cir. 1981).

The rule enunciated by the Supreme Court of South Carolina in Chance applies the rule of Scott v. Illinois, that an uncounseled misdemeanor conviction is constitutionally valid if the offender is not actually incarcerated. The Supreme Court of South Carolina has adopted a logical bright line rule for applying this precedent to the sentencing of recidivist offenders.

> [W]e conclude an uncounseled conviction constitutionally valid under Scott is valid for all purposes and therefore may be used to increase the term of imprisonment for a

> subsequent offense under an enhanced penalty statute. Accordingly, we hold when a defendant was not actually incarcerated for a prior uncounseled misdemeanor, that offense may be used for enhancement.

State v. Chance, supra. The rule avoids the anomaly of a constitutionally valid conviction that may not be subsequently used for the purpose of recidivist sentencing. The Supreme Court of South Carolina has followed and applied the Court's precedent in Scott v. Illinois, and its bright line rule is not barred by Baldasar. The petition for certiorari should be denied since the case was correctly decided and is consistent with both public policy and the Court's prior decisions.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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